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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KELLY M. DEMKO,

Plaintiff and Respondent,

v.

STORYTELLER DISTRIBUTION
CO., LLC et al.,

Defendants and Appellants.

B290916

(Los Angeles County
Super. Ct. No. BC690546)

APPEAL from an order of the Superior Court of
Los Angeles County. Steven J. Kleifield, Judge. Reversed and
remanded with directions.

Greenberg Glusker Fields Claman & Machtinger,
Charles N. Shephard and Lauren R. Fishelman for Defendants
and Appellants.

Haffner Law, Joshua H. Haffner and Michael K. Teiman,
for Plaintiff and Respondent.

Storyteller Distribution Co., LLC and Dreamworks II Distribution Co., LLC (collectively Storyteller) appeal the denial of their motion to compel Kelly M. Demko (Demko) to arbitrate her employment related claims.

In denying the motion to compel, the trial court concluded that two of Demko's five claims were not within the scope of the parties' arbitration agreement. The trial court declined to rule on Demko's arguments that the arbitration agreement was unconscionable, and that she cannot afford arbitration. Because the parties delegated scope of arbitration issues to an arbitrator, the trial court was not permitted to consider whether the parties intended to arbitrate any or all of Demko's claims. We therefore reverse and remand for further proceedings. Upon remand, the trial court shall determine whether the arbitration agreement in the release signed by Demko was unconscionable, an issue which was not delegated to an arbitrator. If the trial court determines that the parties' arbitration agreement was unconscionable, then it shall deny the motion to compel arbitration. If it determines that the arbitration agreement was not unconscionable, then it shall send the matter to arbitration unless Demko proves she is unable to share the cost of arbitration and Storyteller opts not to cover the entire cost itself.

FACTS

Demko worked for Storyteller as an executive in human resources. After her employment was terminated in 2016, Storyteller offered her a severance package in exchange for a release of claims.

She signed the release. In part, it provided: "I agree that any controversy or claim arising out of or in any way relating to this Release or the breach thereof, my employment with

[Storyteller], or the ending of such employment will be settled by confidential final and binding arbitration in accordance with JAMS Employment Arbitration Rules and Procedures in effect at the time the claim is made I agree that any arbitration will be filed with JAMS and heard in Los Angeles, California.”

Per the terms of the release, Demko was paid \$203,125.

In 2018, Demko’s attorney served a letter on Storyteller threatening to sue for wrongful termination. Storyteller filed a demand for arbitration with JAMS seeking a declaration that the release was enforceable and barred Demko’s claims. She refused to arbitrate. Instead, she filed a civil action for wrongful termination based on disability discrimination, wrongful termination based on gender discrimination, breach of employment contract, fraud in the inducement of the release, and rescission of the release.¹

Storyteller filed a motion to compel arbitration. The facts section of the motion averred that Demko objected to arbitrating her claims. According to Storyteller, any issues pertaining to arbitrability raised by her fraud in the inducement and rescission claims had to be decided by the arbitrator based on *Prima Paint Corp. v. Floor & Conklin Mfg. Co.* (1967) 388 U.S. 395, 402 [fraud in the inducement of entire contract rather than just the arbitration clause itself is subject to arbitration] and *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323–324 [same]. Storyteller relied on

¹ This last cause of action was styled “Rescission/Declaratory Relief.” It asserted a right to rescind the release. Alternatively, it requested a declaration that the release was void *ab initio*. It alleged that the release was fraudulently induced, the product of undue influence, and unsupported by consideration. For ease of reference, we refer to it as the rescission cause of action.

Rule 11 of the JAMS Employment Arbitration Rules and Procedures (Rule 11) on the theory that they specifically delegated jurisdiction to the arbitrator to decide all issues pertaining to arbitrability.

Attached to a supplemental declaration filed by its attorney in support of the motion, Storyteller submitted an undated copy of Rule 11.² It provided: “[A]rbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”

Demko filed an opposition and argued that the trial court was required to decide enforceability questions, and that the arbitration clause was unconscionable. Also, she argued that the scope of the arbitration clause did not include her fraud in the inducement and rescission claims. Last, she argued that she cannot afford the arbitration costs, and that Storyteller waived the right to arbitrate because it did not agree to foot the entire bill for the arbitration.

The trial court denied the motion. In its ruling, the trial court considered the following issues: Is this dispute within the scope of the arbitration agreement? Are the issues of fraud in the inducement and rescission clearly and unmistakably delegated to

² Upon request from Storyteller, we took judicial notice of a copy of the applicable JAMS rules, including Rule 11, effective July 1, 2014. We note that Rule 11 is identical in the undated document submitted to the trial court and in the dated document submitted to us.

an arbitrator? Who should decide whether these issues are subject to arbitration?

The trial court noted that Storyteller was relying on a JAMS rule to establish that arbitrability issues must be submitted to the arbitrator, and then stated: “But [Storyteller] [does] not specify whether the rule they submit was the rule in effect when the [release] was signed . . . ; if it was not, then it is of no effect here.” The trial court went on to reason that the JAMS rule did not control because the release contained conflicting provisions. Next, the trial court determined that the fraud in the inducement cause of action and, by implication, also the rescission cause of action, were not within the scope of arbitration. It denied the motion on that ground.

This timely appeal followed.

DISCUSSION

I. Standard of Review.

“The issue of who should decide arbitrability turns on what the parties agreed in their contract. [Citations.]” (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 552 (*Dream Theater*).) If the parties did not submit extrinsic evidence below, “the trial court’s ruling regarding arbitrability is a conclusion of law, and we independently interpret the [c]ontract. [Citations.]” (*Id.* at pp. 551–552.)

II. Only an Arbitrator Can Determine the Scope of the Arbitration Agreement.

A trial court is required to decide whether a dispute is arbitrable except when the parties “clearly and unmistakably” delegate that issue to an arbitrator. (Code Civ. Proc., § 1281.2; *United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1026.) For this exception to apply,

the delegation of the issue to an arbitrator “must not be revocable under . . . contract defenses to enforcement” such as fraud, duress or unconscionability. (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 240; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242.)

Storyteller contends that the exception applies because the parties agreed to arbitrate pursuant to the JAMS Employment Arbitration Rules. Based on Rule 11—which delegates the scope and validity of the arbitration agreement to the arbitrator—Storyteller urges us to reverse. (*Dream Theater, supra*, 124 Cal.App.4th at pp. 549, 557 [agreement to arbitrate pursuant to the American Arbitration Association (AAA) Commercial Arbitration Rules—which permitted an arbitrator to decide “the existence, scope or validity of the arbitration agreement”—was clear and unmistakable delegation of arbitrability issues to an arbitrator].)³

³ There was no dispute below that Rule 11 was in effect when the release was signed. We conclude that the trial court improperly suggested Rule 11 should not be considered when determining the parties’ intent given that Demko never argued that the version of Rule 11 submitted to the trial court was different than the version in effect when she signed the release. We note that *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551 stated, “JAMS Employment Arbitration Rules, rule 11(c) [now 11(b)] provides that ‘Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator.’ This rule has been in existence since at least 2003.” (*Id.* at p. 1570, fn. 20.)

The question presented is whether two clauses in the release were inconsistent with Rule 11's delegation of the scope of arbitration issue to an arbitrator. If not, then the trial court erred when it determined the scope.

The first clause provides that in "reaching a decision, the arbitrator will have no authority to change, extend, modify, or suspend any of the terms of this Release[.]" This clause prohibits an arbitrator from rewriting or ignoring any provisions in the release. It does not, however, prevent an arbitrator from interpreting the arbitration clause and determining whether certain claims fall within its scope. By interpreting what the arbitration clause provides, an arbitrator would not be changing, extending, modifying or suspending any terms. Rather, it would be enforcing the release.

In counterpoint, Demko maintains that an arbitrator could not grant relief on the fraud in the inducement and rescission claims because he or she would have to find the release unenforceable in contravention of the above quoted language. Also, she underscores that "the conclusion a contractual provision is unenforceable 'has [the] effect' of 'chang[ing], modify[ing] or alter[ing]' that provision of the contract[.]" (*J.C. Gury Co. v. Nippon Carbide Industries (USA) Inc.* (2007) 152 Cal.App.4th 1300, 1305.) But this is effectively an argument that the scope of the arbitration agreement does not encompass the fraud in the inducement and rescission claims, an issue that an arbitrator must decide. Thus, Demko must present her argument to an arbitrator, and he or she must interpret the release and decide whether he or she can decide the fraud in the inducement and rescission claims.

Next is the severability clause. It provides: “If any provision of this Release shall . . . be held by a court or other tribunal of competent jurisdiction to be invalid, void or unenforceable, in whole or in part, such adjudication shall in no way affect any other provisions of this Release or the validity or enforcement of the remainder of this Release, and any provisions thus affected shall itself be modified only to the extent necessary to bring the provision within the applicable requirements of the law.” The purpose of a severability clause is to provide that valid provisions of a contract be given effect even if others are invalid or unlawful. (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1230.)

If a severability clause creates an ambiguity as to who should decide an arbitrability question, the question goes to the trial court. (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1445 [a conflict between a delegation clause giving enforceability issues to an arbitrator and severability clause giving those issues to a court means a court is required to decide them]; *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 893–894 [same].)

Though the severability clause creates an ambiguity as to whether an arbitrator should decide whether the arbitration clause is enforceable based on unconscionability, etc., it does not conflict with Rule 11’s delegation of authority to an arbitrator to determine the scope of arbitration.

In defense of the trial court’s order, Demko argues that Rule 11 was not properly incorporated by reference into the release within the meaning of *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1331 (*Troyk*) [for a document to be incorporated by reference into a document executed by the

parties, the reference must be clear and unequivocal, the reference must be called to the attention of the other party, she must consent to the incorporation, and the incorporated document must be known or easily available to the contracting parties].) But this argument was not raised below, and Demko's declaration in opposition to the motion to compel arbitration did not address the *Troyk* factors. Rather, Demko argued that the JAMS rules should not be considered because they were not attached to the release, citing *Ajamian v. CantorCO2E, L.P.* (2012) 203 Cal.App.4th 771, 790 (*Ajamian*) ("while the incorporation of AAA rules into an agreement might be sufficient indication of the parties' intent in other contexts, we seriously question how it provides *clear* and *unmistakable* evidence that an employer and an employee intended to submit the issue of the unconscionability of the arbitration provision to the arbitrator"). We decline to consider the *Troyk* issue on appeal given that it raises new factual issues.

Turning to *Ajamian*, Demko suggests that referencing third-party arbitration rules does not satisfy the clear and unmistakable requirement. But *Ajamian* is inapposite. The arbitration rules there stated that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (*Ajamian, supra*, 203 Cal.App.4th at p. 788.) Per the court, the rules were insufficient evidence of the parties' intent to submit the issue of unconscionability of the arbitration agreement itself to an arbitrator. (*Id.* at p. 790.) Here, as we have explained, the issue is who should decide the scope of arbitration.

More broadly, Demko argues that the question of arbitrability includes issues pertaining to the scope of an arbitration agreement as well as whether it is enforceable. She then suggests that if there is an ambiguity as to who must decide enforceability, there is an ambiguity as to who must decide every other arbitrability question. But Demko cites no law that supports her position. Though she adverts to a statement in *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 945 indicating that the question of who decides arbitrability “is rather arcane” and a party “often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers,” we fail to see how this statement aids Demko’s cause.

Because the trial court improperly denied the motion to compel arbitration based on its scope of arbitration finding, its order must be reversed.

III. On Remand, the Trial Court Must Determine Whether the Arbitration Clause Is Unconscionable.

Storyteller concedes that the issue of unconscionability must be decided by the trial court.

IV. If the Arbitration Clause Is Not Unconscionable, the Trial Court Must Determine Demko’s Ability to Pay the Cost of Arbitration.

Demko pleads financial inability to pay her share of arbitration costs. Next, she contends that because Storyteller refused to pay all arbitration costs, it waived the right to arbitrate. (*Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) 22 Cal.App.5th 970, 978 [if a trial court concludes a plaintiff cannot share the cost of arbitration, the defendant should be given a choice between covering all costs or

waiving the right to arbitrate].) This is an issue the trial court did not reach. Accordingly, on remand, the trial court shall consider Demko's arguments if it decides against her on the unconscionability issue.

All other issues are moot.⁴

DISPOSITION

The order denying the motion to compel is reversed. On remand, the trial court shall rule on Demko's argument that the arbitration agreement is unconscionable. If it is unconscionable, the motion to compel arbitration shall be denied. If not, the trial court must send the matter to arbitration unless Demko proves she cannot share the cost of arbitration and Storyteller declines to pay the entire cost itself.

Storyteller shall recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

⁴ Demko urges us to affirm based on either unconscionability or a finding that Storyteller waived the right to arbitrate because it refused to cover all the costs of arbitration. Because these arguments raise factual issues for the trial court to resolve in the first instance, we decline.